Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEALS NO Q-02-165 OF 2000 AND Q-02-195 OF 2000

GOPAL SRI RAM, SITI NORMA YAAKOB AND MOKHTAR SIDIN JJCA

24 OCTOBER 2001

Family Law *— Children — Custody — Welfare of child paramount — Conflict of affidavit evidence — Whether court should make interim decision for custody of children — Whether custody should be granted to husband or wife*

Family Law *— Financial obligation — Maintenance — Jurisdiction of court — Whether trial judge had jurisdiction to entertain application for maintenance in the absence of pending divorce petition — Law Reform (Marriage and Divorce) Act 1976 s 77(1)(a) — Married Women and Children (Maintenance) Act 1950 ss 3(2) & 9*

Family Law *— Financial obligation — Maintenance — Maintenance of wife and children — Whether sum of RM50,000 reasonable — Arrears of maintenance*

The two appeals were heard together as they stem from the same matrimonial proceedings commenced by the wife (the appellant in Civil Appeal Q-02-165-2000) against the husband (the appellant in Civil Appeal Q-02-195-2000). The parties were married on 29 August 1986 and cohabited at No 70, Brooke Drive, Sibu ('the matrimonial home'). They had four children, Stefany Valerie Tiong Fhong ('Stefany') aged 13 and three younger children. The husband left the matrimonial home on February 1999 together with the three younger children and took up residence at 17½ Mile, Ulu Oya Road, Sibu ('the farmhouse'), while the wife continued to reside at the matrimonial home. The wife commenced proceedings against the husband on 6 September 1999 claiming, inter alia, guardianship, custody, care and control of the four children; monthly maintenance of RM50,000 from 1 January 1998 and additional monthly maintenance of RM50,000 for all the four children once custody had been given to her. The husband also filed an application seeking, inter alia, custody, care and control of all the children. Both the wife's originating summons and husband's application were heard jointly and were subsequently dismissed by the trial judge. The trial judge ruled that the wife could not take advantage of s 77(1)(a) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') due to the absence of a pending divorce petition, he had no jurisdiction to entertain such an application under ss 3(2) and 9 of the Married Women and Children (Maintenance) Act 1950 and the question of custody be ventilated at the hearing of the divorce petition. No divorce proceedings had been commenced by any of the parties during in the proceedings in the High Court, although the wife had filed a reconciliation application with the Registrar of Marriages at Sibu District, Sibu in accordance with s 106 of the Act.

Held:

(1) The Act was a piece of social legislation for which a liberal interpretation was more apt than a strict one. As such, matrimonial proceedings needed not necessarily commence with the filing of a petition for divorce, legal separation or nullity of marriage. Any step taken by a party under the Act as a prelude to bringing the marriage to an end was sufficient to put s 77(1)(a) into motion. In this instance, the wife had filed a s 106 reconciliation application to a conciliatory body at the material time, a mandatory requirement for any person seeking to put an end to the marriage and now a petition for divorce had already been filed by the wife in the High Court at Sibu and registered as Divorce Petition No 33–16–2000. On the facts of this case, the High Court had the necessary jurisdiction to entertain the wife's application for maintenance under s 77(1)(a) (see p 103E–G).

(2) As for the issue of the custody of the four children of the marriage, whilst the six affidavits filed by the wife conflicted with the seven filed by the husband, this should not have deterred the trial judge from making a decision, albeit an interim one, on this contentious matter as the relevant consideration in law was the paramount interest and welfare of the children of the marriage. It was the omission on the part of the trial judge to consider this aspect of the law that compelled the court to disturb and reverse his finding of indefinitely putting off the determination of the disputed custody matter until the hearing of the divorce petition between the parties. The trial judge should have sieved through such evidence, consider only those that were undisputed or uncontroverted and balance these with the consideration of what would work towards the betterment and interests of the four children. In this regard, he should be reminded of the provisions of s 88(2) of the Act and to act accordingly. Since he had omitted to do so, this matter of custody was remitted to him for a rehearing together with the pending Divorce Petition No 33–16–2000, and to that extent, the wife's appeal was allowed, Q–02–165–2000, the order dismissing the wife's originating summons was set aside and restored to the file (see pp 103H, 104G–I).

(3) Since the judge had the necessary jurisdiction to entertain the wife's application for maintenance under s 77(1)(a) of the Act, the issue of the wife's maintenance was also to be reheard together with the divorce petition with costs pertaining to the wife's appeal to follow the event of the rehearing. The husband's appeal, Q–02–195–2000, was dismissed with costs to follow the event of the rehearing of his application for custody. The deposits made by the parties in both appeals were to be refunded to them (see p 105A–B).

(4) Dealing with the matter of custody and considering the best interest, welfare and happiness of the four children, the status quo should be maintained and the three children continue to reside

with their father and Stefany with her mother. The court allowed both parties access to the children as stipulated in its order (see p 105C–I).

(5) The figure of RM50,000 asked for by the wife was on the high side. She must realized that she too had a price to pay for the breakdown of the marriage. However, bearing in mind the generous lifestyle that she was used to, a monthly sum of RM25,000 for her and Stefany would be sufficient to maintain both of them and the husband shall commence paying such monthly maintenance from 1 July 2000. There was also the period of one year preceding this for which the husband had failed to maintain both the wife and Stefany, and the court ordered that the husband do pay all arrears due for that one year within 90 days from 13 June 2000 (see p 106D–F).

[Bahasa Malaysia summary

Kedua-dua rayuan ini dibicarakan bersama kerana kedua-duanya berasal dari prosiding hal-ehwal suami isteri yang sama yang dimulakan oleh si isteri (perayu dalam Rayuan Sivil Q-02-165-2000) terhadap si suami (perayu dalam rayuan sivil Q-02-195-2000). Pihak-pihak telah berkahwin pada 29 Ogos 1986 dan bersekedudukan di No 70, Brooke Drive, Sibu ('kediaman suami isteri tersebut'). Mereka mempunyai empat orang anak, Stefany Valerie Tiong Fhong ('Stefany') yang berumur 13 tahun dan tiga orang adiknya. Si suami meninggalkan kediaman suami isteri tersebut pada Februari 1999 bersama tiga orang anak kecil tersebut dan menetap di Batu 17½, Jalan Ulu Oya, Sibu ('rumah ladang tersebut'), manakala si isteri kekal menetap di kediaman suami isteri tersebut. Si isteri memulakan prosiding terhadap si suami pada 6 September 1999 untuk menuntut, antara lain, penjagaan, jagaan, pemeliharaan dan kawalan keempat-empat orang anak; nafkah bulanan berjumlah RM50,000 dari 1 Januari 1998 dan nafkah bulanan tambahan sebanyak RM50,000 bagi keempat-empat orang anak selepas jagaan diberikan kepadanya. Si suami juga memfailkan suatu permohonan untuk mendapatkan, antara lain, jagaan, pemeliharaan dan kawalan keempat-empat orang anak tersebut. Kedua-dua saman pemula si isteri dan permohonan si suami dibicarakan bersama dan ditolak oleh hakim perbicaraan. Hakim perbicaraan memutuskan bahawa si isteri tidak boleh memakai s 77(1)(a) Akta Membaharui Undang-Undang (Perkahwinan dan Penceraian) 1976 ('Akta tersebut') kerana ketiadaan petisyen penceraian yang menunggu perbicaraan dan oleh itu, beliau tidak mempunyai bidang kuasa untuk melayan permohonan di bawah ss 3(2) dan 9 Akta (Nafkah) Wanita Berkahwin dan Kanak-Kanak 1950 dan persoalan jagaan perlu diperdengarkan di perbicaraan petisyen penceraian. Tiada prosiding penceraian dimulakan oleh mana-mana pihak sewaktu prosiding dijalankan di Mahkamah Tinggi, walaupun si isteri telah memfailkan satu permohonan perdamaian di

Pendaftar Perkahwinan di Daerah Sibu, Sibu, menurut aturan s 106 Akta tersebut. A

Diputuskan:

(1) Akta tersebut merupakan satu undang-undang sosial yang wajar diberikan tafsiran liberal dan bukannya tafsiran ketat. Oleh itu, B prosiding hal-ehwal suami isteri tidak perlu semestinya dimulakan dengan memfailkan petisyen penceraian, perpisahan undang-undang atau pembatalan perkahwinan. Apa jua langkah yang diambil oleh mana-mana pihak di bawah Akta tersebut sebagai permulaan tindakan untuk menamatkan satu perkahwinan memadai untuk mewajarkan pemakaian s 77(1)(a). Dalam kes C ini, si isteri telah memfailkan satu permohonan pendamaian s 106 kepada suatu perbadanan pendamaian pada waktu yang material, satu keperluan yang wajib bagi sesiapa yang ingin menamatkan perkahwinannya dan sekarang satu petisyen penceraian telahpun difailkan oleh si isteri di Mahkamah Tinggi Sibu dan didaftarkan sebagai Petisyen Penceraian No 33-16-2000. Melihat fakta-fakta D kes ini, Mahkamah Tinggi mempunyai bidang kuasa yang diperlukan untuk melayan permohonan si isteri untuk nafkah di bawah s 77(1)(a) (lihat ms 103E–G).

(2) Berkenaan isu jagaan empat orang anak hasil perkahwinan tersebut, walaupun enam afidavit yang difailkan oleh si isteri E bercanggah dengan tujuh yang difailkan oleh si suami, ini tidak patut menghalang hakim perbicaraan daripada membuat keputusan, walaupun keputusan tersebut interim, bagi perkara yang perlu dibicarakan ini kerana pertimbangan yang relevan di sisi undang-undang ialah kepentingan dan kebajikan kanak-kanak hasil perkahwinan tersebut. Ini merupakan satu peninggalan oleh F hakim perbicaraan untuk mempertimbangkan aspek undang-undang ini yang mendesak mahkamah untuk mengakaskan keputusan beliau untuk menangguhkan keputusan hal jagaan sehingga perbicaraan petisyen perkahwinan di antara pihak-pihak. Hakim perbicaraan juga sepatutnya memeriksa segala keterangan dan mempertimbangkan hanya keterangan yang tidak G dipertikaikan dan menyeimbangkan keterangan ini dengan pertimbangan apa yang dapat membaikpulih dan menjaga kepentingan empat orang kanak-kanak tersebut. Dalam perkara ini, hakim perbicaraan patut diingatkan mengenai peruntukan s 88(2) Akta tersebut dan bertindak sewajarnya. Oleh kerana H beliau gagal berbuat demikian, hal jagaan tersebut diremitkan kepada beliau untuk perbicaraan semula bersama Petisyen Penceraian No 33-16-2000 yang menunggu penyelesaian, dan pada takat itu, rayuan isteri tersebut iaitu Q-02-165-2000 dibenarkan, perintah yang menolak saman pemula si isteri diketepikan dan dipulangkan ke fail (lihat ms 103H, 104G–I). I

(3) Oleh kerana hakim mempunyai bidang kuasa untuk melayan permohonan si isteri untuk nafkah di bawah s 77(1)(a) Akta

tersebut, hal nafkah si isteri juga perlu dibicarakan semula bersama petisyen penceraian dengan kos bagi rayuan si isteri berikutan perbicaraan semula tersebut. Rayuan si suami, Q-02-195-2000, ditolak dengan kos berikutan perbicaraan semulanya untuk jagaan. Cagaran yang diberi oleh kedua-dua pihak dalam dua rayuan tersebut harus dipulangkan kepada mereka (lihat ms 105A–B).

(4) Berkenaan hal jagaan dan demi kepentingan, kebajikan dan kebahagiaan empat orang kanak-kanak tersebut, status quo perlu dikekalkan dan tiga orang kanak-kanak tersebut harus dibenarkan terus menetap bersama ayah mereka dan Stefany bersama ibunya. Mahkamah membenarkan kedua-dua pihak akses kepada kanak-kanak tersebut seperti yang dinyatakan dalam perintahnya (lihat ms 105C–I).

(5) Jumlah RM50,000 yang dimohon oleh si isteri terlalu tinggi. Beliau mestilah menyedari bahawa beliau juga memainkan peranan dalam pemusnahan rumahtangga mereka. Walau bagaimanapun, memandangkan gaya hidup mewah yang menjadi kebiasaannya, jumlah bulanan sebanyak RM25,000 bagi beliau dan Stefany sudah mencukupi untuk menanggung keperluan kedua-dua orang dan si suami akan mula memberikan tanggungan bulanan ini mulai 1 Julai 2000. Juga terdapat jangka satu tahun sebelum ini di mana si suami gagal menanggung si isteri dan Stefany, dan mahkamah mengarahkan agar si suami membayar semua nafkah yang tertunggak bagi tahun tersebut dalam masa 90 hari dari 13 Jun 2000 (lihat ms 106D–F).]

Notes

For cases on custody of children, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2308–2321.

For cases on maintenance, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2550–2553.

For a case on maintenance of wife and children, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) para 2561.

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 77(1)(a), 88(2), 106

Married Women and Children (Maintenance) Act 1950 ss 3(2), 9

Appeal from: Originating Summons No 24–212 of 1999 (High Court, Sibu).

SS Muker (*Fabian AH Lim* with him) (*Stephen Robert & Wong*) for the appellant wife in Q–02–165–2000 and the respondent in Q–02–195–2000.

YN Foo (*Stephen Chang & Faridah Abdullah* with her) (*Lim & Lim*) for the respondent husband in Q–02–165–2000 and the appellant in Q–02–195–2000.

Siti Norma Yaakob JCA (delivering judgment of the court): These two appeals were heard together as they stem from the same matrimonial proceedings commenced by the wife, the appellant in Civil Appeal Q–02–165–2000, against the husband, the appellant in Civil Appeal Q–02–95–2000.

The parties were married on 29 August 1986 and cohabited at no 70, Brooke Drive, Sibu ('the matrimonial home'). They have four children namely:

(1) Stefany Valerie Tiong Fhong (f) ('Stefany') born on 6 June 1987;

(2) Kenneth Tiong Yung Yee ('Kenneth') born on 1 May 1988;

(3) Clara Tiong Siew Ee (f) ('Clara') born on 8 March 1991; and

(4) Kelvin Tiong Yung Yiing ('Kelvin') born on 30 November 1992.

As at the hearing of these appeals before us, the four children were aged 13, 12, 9 and 8 respectively.

In February 1999, the husband left the matrimonial home together with Kenneth, Clara and Kelvin ('the three children') and they took up residence at 17½ Mile, Ulu Oya Road, Sibu, ('the farmhouse') together with one Madam Yong and her four children. The wife continued to reside at the matrimonial home together with Stefany.

On 6 September 1999, seven months after the husband moved out of the matrimonial home, the wife commenced proceedings against the husband claiming, inter alia, the following three reliefs:

(1) the guardianship, custody, care and control of the four children;

(2) monthly maintenance of RM50,000 for herself to take effect from 1 January 1998;

(3) an additional monthly maintenance of RM50,000 for all the four children once custody has been given to her.

Upon the filing of her originating summons, the wife also filed and obtained an ex parte order restraining the husband from removing or taking away the four children out of Malaysia.

Not to be outdone, the husband also filed an application seeking, inter alia, custody, care and control of all the four children.

The wife's originating summons and the husband's application for custody were heard jointly, at the end of which Tee Ah Seng J dismissed both applications and ordered that each party bear its own costs. In considering the wife's application for maintenance, the trial judge ruled that she could not take advantage of s 77(1)(a) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') as the requirement of para (a) of sub-cl (1) of that section had not been met. Alternatively, he had no jurisdiction to entertain such an application under ss 3(2) and 9 of the Married Women and Children (Maintenance) Act 1950, as the jurisdiction to hear such application is vested only to the magistrates or sessions courts.

As for the issue of who should get the guardianship, custody, care and control of the four children, since the affidavits affirmed by both parties conflict each other on all material particulars, the trial judge held that the disputed question of custody be ventilated at the hearing of the petition for divorce. He also took into consideration of the fact that the wife took no positive steps to obtain custody after the husband left the matrimonial home, but was content to let seven months pass by before filing the originating summons. This delay, he contended, worked against the wife's interests.

It is not disputed that at the hearings of the two applications in the court below, no divorce proceedings had been commenced by any of the parties, although the wife had already taken the necessary step of filing a reconciliation application with the Registrar of Marriages at Sibu District, Sibu, in accordance with s 106 of the Act as a prelude to the filing of a divorce petition. It is this absence of a pending divorce petition that had influenced the trial judge to rule that the wife had failed to satisfy the provisions of s 77(1)(a) of the Act, under which her application for maintenance is made. Section 77(1)(a), in its entirety, reads as follows:

> Power for court to order maintenance of spouse
>
> (1) The court may order a man to pay maintenance to his wife or former wife —
>
> (a) during the course of any matrimonial proceedings;

We say that the trial judge had erred when he ruled that he had no jurisdiction to entertain the wife's application for maintenance under the above section. This is so as we acknowledge the Act to be a piece of social legislation for which a liberal interpretation is more apt than a strict one. As such, matrimonial proceedings need not necessarily commence with the filing of a petition for divorce, legal separation or nullity of marriage. Any step taken by a party under the Act as a prelude to bringing the marriage to an end is sufficient enough to put s 77(1)(a) into motion. In this instance, the wife had filed a s 106 reconciliation application to a conciliatory body at the material time, a mandatory requirement for any person seeking to put an end to the marriage, and we have since been informed at the hearing of these appeals that a petition for divorce had already been filed by the wife in the High Court at Sibu and registered as Divorce Petition No 33–16–2000. We say that on the facts of this case, the High Court had the necessary jurisdiction to entertain the wife's application for maintenance under s 77(1)(a).

As for the issue of the custody of the four children of the marriage, whilst we appreciate that the six affidavits filed by the wife conflict with the seven filed by the husband, this should not have deterred the trial judge from making a decision, albeit an interim one, on this contentious matter as the relevant consideration in law is the paramount interest and welfare of the children of the marriage. It is to be expected that in a highly contentious custody matter like the one before us, both sides are bound to paint the worst imaginable image of the other so that custody is denied to the guilty party.

On behalf of the wife, it was argued in the court below that the husband is not a fit and proper parent to be granted custody of the four children based on the following main factors:

(1) that the husband has an adulterous relationship with Madam Yong who also resides at the farmhouse together with him, the three children and her own four children. As such, the environment to which the three children is exposed to is not conducive for their healthy and proper upbringing;

(2) as the managing director of a public listed company and a director of 26 other companies, the husband has to entertain and travel extensively and this leaves him with little or no time to tend to the care and upbringing of the three children. Invariably, that responsibility will pass on to the Indonesian maids, employed by him;

(3) that the husband had tried all means to sever the wife's ties with the three children by denying her access to them.

The picture of the wife, as painted by the husband can be summed up as follows:

(1) that she is very possessive, bossy, selfish and bad tempered and these had led to frequent quarrels and tension in the matrimonial home;

(2) with her bad temper, she became abusive to the children and had threatened to kill them. She had beaten Kenneth for being slow in his studies, Clara for calling her a monster and Stefany for being slow on the piano.

Allegations and counter allegations of other forms of improper behavior made by one party against the other abound in the 13 affidavits filed in support or in opposition to the applications for custody. They are all aimed at showing either party to be the guilty party and therefore not the fit and proper parent to have the custody of the four children. Needless to say the affidavit evidence alone, conflicting as they are, cannot form the basis of deciding the truth of the matters complained of in the absence of any cross examination of the makers of the affidavits. However, above and beyond that, there is the paramount interest and welfare of the children to be considered and it is the omission on the part of the trial judge to consider this aspect of the law that compelled us to disturb and reverse his finding of indefinitely putting off the determination of the disputed custody matter until the hearing of the divorce petition between the parties.

Faced with such conflicting affidavit evidence, what the trial judge should have done was to sieve through such evidence, consider only those that are undisputed or uncontroverted and balance these with the consideration of what would work towards the betterment and interests of the four children. In this regard, he is reminded of the provisions of s 88(2) of the Act and to act accordingly. Since he had omitted to do so, we remitted the matter of custody to him for a rehearing together with the pending Divorce Petition No 33–162000 and to that extent, we allowed the wife's appeal, Q–02–165–2000, set aside the order dismissing the wife's originating summons, and restored it to the file.

Likewise, since we have ruled that the trial judge has the necessary jurisdiction to entertain the wife's application for maintenance under s 77(1)(a) of the Act, the issue of the wife's maintenance is also to be reheard together with the divorce petition with costs pertaining to the wife's appeal to follow the event of the rehearing. Consequently, we also ordered that the husband's appeal, Q–02–195–2000, be dismissed with costs to follow the event of the rehearing of his application for custody. The deposits made by the parties in both appeals are to be refunded to them.

Pending the rehearing, we had also made some interim orders on maintenance and custody.

Dealing with the matter of custody and considering the best interest, welfare and happiness of the four children, we are of the opinion that the status quo be maintained and the three children continue to reside with their father and Stefany with her mother. Stefany has been separated from her siblings for more than 15 months and although this is not a desirable situation, that can, for some measure, be overcome by an order of access when all the four children can be together. Removing the three children from their present environment may create negative effects on them. With the passing of time, they have adjusted themselves to the pain of separation from their mother and sister. Returning them to their mother may be traumatic as that will revive past unpleasantness and create new ones. They have settled in their new school, a move that was strongly objected to by the wife and a change of residence may well prompt the wife to relocate them at their original school. There is no evidence that the husband had behaved less than a loving and caring parent to them or that they have not adjusted to their present surroundings and a lifestyle that is dictated by him. The threat that Madam Yong might not be a good influence on them has since been removed as she no longer lives with them at the farmhouse. In the light of the matrimonial difficulties faced by their parents, and the fact that the four children are in no position to express their choice, we consider that it would be more in their welfare and interests that they remain where they are, Stefany with their mother and her three siblings with their father until the final custody order is made at the hearing of the divorce petition. In the meantime, we allowed the wife to have access to the three children during the weekends from 5pm on Fridays until 8pm on Sundays, and in the execution of that access order, the husband shall deliver and collect the three children from the matrimonial home.

In the course of writing this judgment, we realize that we had overlooked the fact that the husband should also have been allowed access to Stefany. As our custody order is subject to review, perhaps the access order in favour of the wife be amended to take effect every other weekend so that on the weekend the wife has no access to the three children, the husband can have access to Stefany by her spending the weekend with her father and her siblings at the farmhouse on terms similar to the access order that has been granted to the wife with the difference that when Stefany joins her father and siblings, the wife shall deliver her and collect her from the farmhouse.

It is not disputed that the husband had not been maintaining the wife since 1 June 1999, and she is claiming RM50,000 per month so that she is restored to the style of life that she was accustomed to. She contends that the amount would not be a financial burden to the husband as he is a multi millionaire with large shareholdings in a family company and at least 28 other companies, and substantial investments in the property market. She estimated his taxable income for the year 1999 to be approximately RM1.2m and non-taxable income at RM1.4m. With all the income and benefits due to him, the husband had been giving her RM22,000 as her personal monthly expenses and the use of credit card facilities to the credit of RM30,000 per month. Additionally, he paid for the children's tuition fees, the salaries of the maids, drivers and cook, household expenses and the medical and dental bills. She estimated that his monthly income from salaries, directors' fees, dividends and other benefits to be in the region of RM220,000.

Whilst the husband denies the extent of his financial standing, as averred to by the wife, the fact still remains that he is not a struggling wage earner as he could afford lavish overseas holidays for the family and was generous towards the wife.

The wife is an advocate and solicitor and presently works as a legal adviser to a group of companies known as Rimbunan Hijau for which she is paid a monthly salary of RM3,500. We feel that the figure of RM50,000 asked for by the wife to be on the high side, and she must realize that she too has a price to pay for the breakdown of the marriage. However, bearing in mind the generous lifestyle that she was used to, we consider that a monthly sum of RM25,000 for her and Stefany would be sufficient to maintain both of them and the husband shall commence paying such monthly maintenance from 1 July 2000. There is also the period of one year preceding this for which the husband had failed to maintain both the wife and Stefany, and we accordingly ordered that the husband pay all arrears due for that one year within 90 days from 13 June 2000, the day we made the maintenance order.

Order accordingly.

Reported by Chew Phye Aun